No. 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

vs.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants.

BRIEF FOR APPELLANT.

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Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank, Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng,

Appellees and Cross-Appellants.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal and cross-appeal from a decree of the United States Court for China.

R. T. McDonnell, defendant below anad appellant and cross-appellee here, is assignee of American Overseas Warehouse Company, Inc., an insolvent American corporation, which formerly conducted a warehouse (godown)

at Tientsin. On the failure of the Warehouse Company some 91,666 bags of flour were in its warehouse, and came into the hands of defendant as assignee. The flour was in one common unsegregated mass, without marks except the brands on the bags, and with nothing to indicate that any part of it was owned by any particular person (Tr. p. 55).

Against the 91,666 bags of flour on hand there were outstanding claims for 1,157,500 bags. The plaintiffs below, the appellees and cross-appellants in this court, held so-called "godown warrants" or warehouse receipts for 996,500 bags. The National City Bank of New York, as assignee of a pledge of flour made by Union Trading Corporation to the Warehouse Company, and by the Warehouse Company assigned to the Bank, held pledge agreements calling for 161,000 bags. To one of these pledge agreements was attached a "godown warrant" (Exh. 2, Sheet 2, Tr. pp. 23-24) in the form of the warrants held by plaintiffs; the other five had no warrants. All six agreements carried the written acknowledgment of the Warehouse Company that it had received the pledged flour and would hold the same subject to the order of the Bank (Tr. p. 19).

Inasmuch as the case turns on the ruling of the trial court that the pledge agreements, notwithstanding the Warehouse Company's endorsement thereon, "were not the legal equivalent of godown receipts" (Tr. p. 50), we will later more particularly describe these agreements.

By consent of the parties, defendant, as assignee, sold the flour on hand, realizing therefor the sum of $300,489.86*

(*All amounts of money mentioned in this brief are in Tientsin Currency, a dollar of which is equal to approximately forty-seven cents in United States currency.)

(Tr. p. 3). He then issued a plan for the ratable distribution of this amount among all the receipt-holders, in proportion to the number of bags of flour of the various brands called for by their receipts (Exh. "C," Tr. pp. 7-11). This plan included an allotment to The National City Bank of its ratable share of $53,137.32 (Tr. pp. 10-11).

Plaintiffs, as holders of godown receipts, brought this suit to prevent defendant from allotting anything to The National City Bank.

The trial court decided that the Bank should participate ratably with plaintiffs in the fund in the hands of defendant as assignee, to the extent of the flour covered by the one agreement, on which a formal godown warrant had been issued to it by the Warehouse Company. With respect to flour covered by the remaining five agreements, the court decided that the Bank had no right of participation. The court accordingly reduced the allotment made by defendant in favor of the Bank from $53,137.32 to $6600.90 (or to $3300.45, depending on a determination as to whether any flour of the Red Battleship brand, one of the brands covered by the Bank's godown warrant, had come into the possession of defendant as assignee) (Tr. pp. 50-51). From this decree defendant has appealed and plaintiffs have taken a cross-appeal.

In its decision, the court applied a different rule to plaintiffs than to the Bank. It allowed plaintiffs to participate ratably in the fund held by defendant without showing that any of the flour, from the sale of which the money came, was the identical flour against which their receipts were issued. But as to the Bank, the court, while conceding the validity of the pledge, decided that the

pledge was not effective except against the identical flour originally delivered in pledge, and gave the Bank no right of ratable participation in the proceeds of the indistinguishable mass. The decision below is, in other words, that while the wrongful intermingling by a warehouse company of flour of different persons and its misappropriation of part of the mass would not affect the rights of the ordinary receipt-holder to share ratably in what was left, still such intermingling and misappropriation would destroy the rights of a pledgee, notwithstanding that the pledge was in its inception valid.

This ruling presents the main question on the appeal. We will discuss in a separate brief the contentions which plaintiffs may make on the cross-appeal.

THE FACTS.

The "godown receipts" of plaintiffs are in the form of which Exhibit "B" (Tr. pp. 6-7) is a specimen.

The six documents, or pledge agreements, held by The National City Bank are in the same form as Exhibit 1 (Tr. pp. 15-19). Each of them contains the promise of the Trading Company to repay a specified sum to the Warehouse Company; recites the delivery in pledge of specified bags of flour to the Warehouse Company as security for the loan, and confers the broadest powers on the Warehouse Company as pledgee (Tr. pp. 16-18). Contemporaneously with each pledge, the Warehouse Company delivered the pledge agreement to The National City Bank with the following endorsement (Tr. p. 19):

"We have received the goods mentioned in this instrument and will hold same to the order of The National City Bank of New York and we hereby transfer all our rights under this instrument to The National City Bank of New York.

The American Overseas Warehouse Co., Inc.,
(Sgd.) C. H. Cornish,
General Manager."

In one of the six cases—the one with respect to which the trial court held the Bank entitled to participate ratably with plaintiffs in the proceeds of the flour—the Warehouse Company, as above stated, also issued a godown warrant in favor of the Bank, covering the pledged flour (Exh. 2, Sheet 2, Tr. pp. 23-24).

THE QUESTIONS INVOLVED.

Paragraphs 1 to 8 of the complaint contain formal allegations identifying the plaintiffs; set forth the appointment of defendant as assignee of the Warehouse Company; allege that plaintiffs hold receipts for 996,500 bags of flour; allege the shortage, the sale of the flour by defendant as assignee and the making of his proposed plan of distribution, including the allotment of $53,137.32 to The National City Bank (Tr. pp. 2 and 3). Paragraph 9 of the complaint is as follows (Tr. pp. 3-4):

"The plaintiffs deny that The National City Bank of New York is entitled to the said sum of $53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum should be distributed amongst such of their number as hold warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant."

The complaint concludes with a prayer that the whole sum held by defendant be distributed among plaintiffs (Tr. p. 4).

The answer (Tr. pp. 12-13) admits paragraphs 1 to 8 of the complaint. Answering paragraph 9 it avers (Tr. p. 13):

> "The defendant denies the allegations contained in paragraph 9 of the plaintiffs' complaint, and alleges that The National City Bank of New York is the owner and holder of six certain godown warrants or trust receipts issued to said Bank by the said American Overseas Warehouse Company, Inc., which call collectively for the delivery of 161,000 bags of flour of various brands, and therefore said Bank is entitled to participate *pro rata* in the distribution referred to in plaintiffs' complaint."

The reply admits that The National City Bank holds documents bearing the endorsement of the Warehouse Company in the form already quoted (Tr. p. 14), but denies:

> *a.* "* * * that the goods were ever received by the said Warehouse Company as alleged in the said endorsement" (Tr. pp. 14-15);
>
> *b.* "* * * that if any of the said goods were received by the said Warehouse Company, they were received under such conditions as constituted a valid pledge thereof" (Tr. p. 15);
>
> *c.* "* * * that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said Company ceased to do business and from which date the assignment by the said Company to the defendant as assignee operated" (Tr. p. 15).

The trial court decided against plaintiffs with reference to points (a) and (b). It found that the flour mentioned in the documents held by The National City Bank had been delivered to the Warehouse Company in pledge, and also held the documents sufficient in form to constitute a valid pledge of the flour by the Trading Company to the Warehouse Company (Tr. pp. 37-38).

The decision denying the Bank's right of ratable participation (except as to the one agreement on which a godown warrant had been issued, Exh. 2, Tr. pp. 23-24) was on the sole ground, already mentioned as presenting the main question on the appeal, that the pledge could only be effective against the identical flour which had been delivered in pledge (Tr. pp. 38-40).

ASSIGNMENT OF ERRORS.

(Tr. pp. 66-68.)

1. That the United States Court for China erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and The National City Bank of New York was that of pledgor and pledgee (Decision and Judgment, pages 6 to 9, inclusive).

2. That the United States Court for China erred in holding and deciding that The National City Bank of New York, having left with the American Overseas Warehouse Company, Inc., as bailee, certain fungible merchandise, was entitled to receive that particular merchandise only and that after a commingling of such particular merchan-

dise with other merchandise of a like kind, the said National City Bank of New York could not participate *pro rata* in the commingled property.

3. That the United States Court for China erred in holding and deciding that The National City Bank of New York could not successfully claim any merchandise of a fungible nature left by it with the American Overseas Warehouse Company as bailee, without proving by competent evidence that the actual merchandise so left with the said American Overseas Warehouse Company was in the possession of the assignee of that Company at the time he took over as such assignee.

4. That the United States Court for China erred in holding and deciding that all of the transactions between the American Overseas Warehouse Company and The National City Bank of New York similar to the one illustrated by Exhibit 1, do not as a matter of law, place The National City Bank of New York in the position of a holder of a warehouse receipt.

5. That the United States Court for China erred in ordering the defendant to revise and readjust his proposal for the distribution of the proceeds in his hands from the sale of the flour found in the warehouses of the American Overseas Warehouse Company, Inc., when the same were taken possession of by the defendant as assignee.

6. That the United States Court for China erred in ordering the defendant not to recognize the claim of The National City Bank of New York as being entitled to participate *pro rata* in the proceeds from the sale of said flour with the plaintiffs.

7. That the United States Court for China erred in not approving the scheme of distribution proposed by the defendant.

8. That the United States Court for China erred in denying defendant's motion for a new trial.

ARGUMENT.

THE NATIONAL CITY BANK, AS ASSIGNEE OF A VALID PLEDGE MADE BY THE TRADING COMPANY TO THE WAREHOUSE COMPANY, AND AS HOLDER OF THE WAREHOUSE COMPANY'S RECEIPTS EVIDENCING THE DEPOSIT OF THE FLOUR SUBJECT TO THE PLEDGE, IS ENTITLED TO PARTICIPATE RATABLY WITH THE OTHER RECEIPT-HOLDERS IN THE DISTRIBUTION OF THE PROCEEDS OF THE SALE OF THE FLOUR.

First: The pledge of The National City Bank was not extinguished by any wrongful acts of the Warehouse Company in intermingling the pledged flour with other flour and misappropriating part of the mass.

So far as concerned the rights of plaintiffs as holders of godown warrants, the trial court applied the general rule that where goods, either by the consent of all concerned or wrongfully by a depositary, are so intermingled as to be indistinguishable, the holders are tenants in common of the mass, and if a part of the mingled property is lost or is misappropriated by the depositary, all the owners bear the loss *pro rata*. This general proposition is not in dispute and is well settled. See:

Dows v. Ekstrone (C. C. Minn.) 3 Fed. 19;

Ramsey v. Rodenburg, 72 Colo. 567, 212 Pac. 820, 821;

Dole v. Olmstead, 36 Ill. 150, 155;

Sawers Grain Co. v. Goodwin, 83 Ind. App. 556, 146 N. E. 837, 841;

Drudge v. Leiter, 18 Ind. App. 694, 49 N. E. 34, 37-38;

Arthur v. Chicago, Rock Island etc. R. Co., 61 Iowa 648, 17 N. W. 24, 25;

Forbes v. Fitchburg R. Co., 133 Mass. 154, 160;

Cushing v. Breed, 14 Allen (Mass.) 376, 380;

Weiland v. Sunwall, 63 Minn. 320, 65 N. W. 628, 629;

Tobin v. Portland Flouring Mills Co., 41 Ore. 269, 68 Pac. 743, 745;

Hamilton v. Blair, 23 Ore. 64, 31 Pac. 197, 198;

Goodman v. Northcutt, 14 Ore. 529, 13 Pac. 485, 488;

Young v. Miles, 20 Wis. 615, 623.

The trial court, however, while deciding that plaintiffs, as holders of warehouse receipts, were entitled to participate ratably in the remnant of the flour in the warehouse, and that their rights were not destroyed by any wrongful act of the Warehouse Company in intermingling flour belonging to different owners, nevertheless squarely held that such wrongful intermingling cut off the rights of the Bank under its otherwise valid pledge. The court said (Tr. pp. 38-40):

> "Now it seems to me very clear that in such a situation the Bank was not entitled to receive from the Warehouse Company any other property, or any other bags of flour than those which the Warehouse Company had received as a pledge, and which it had agreed to hold to the order of the Bank. Certainly neither the Bank nor the Overseas Warehouse Company had the right to appropriate the flour, or any part thereof, that had been stored with the Warehouse Company by the holders of these warehouse receipts in order to make good any misappropriation

or loss of such pledged property. The determination of the rights of these parties under their respective muniments of title, comes down, in my opinion, largely to a matter of proof. If the Bank were able to show, by a preponderance of the evidence, that these 45,000 bags of flour of Shanghai and Egyptian brands, and which had been received by the Warehouse Company as a pledge, were still in the warehouse or godown of the company, having been specially set aside and earmarked as the property of the Union Trading Company, then I take it that the Bank would be entitled to the possession of such property, even though there was not another bag of flour in the godown or warehouse which could be appropriated for the benefit of these plaintiffs as holders of godown warrants. But the difficulty, with respect to the claim of the Bank, is that no flour was found upon the premises specially ear-marked or set aside as the property of the Bank, or as the property of the Union Trading Company, and it may very well have been, in view of the misappropriation by the Warehouse Company of more than a million bags of flour, that the 'pledged flour,' in which only the Bank had an interest, was entirely misappropriated by someone connected with the Warehouse Company. *However that may be, as I view the case it was necessary for the Bank to prove by competent evidence that the flour which it claimed as a pledge and as security for the payment of its note, was in the possession of the assignee at the time he took over the 91,666 bags of flour of various brands on the 1st of August, 1927''* (italics ours).

We submit that the foregoing considerations apply as well to plaintiffs as to the Bank, and that they, therefore, afford no ground for allowing plaintiffs greater rights than the Bank to the flour on hand. A bailment covers specific, defined property (6 C. J. 1139) just as much as a pledge. If any one of the plaintiffs could have identified any of the flour which came into the hands of defendant as assignee, as the identical flour called for by its warehouse receipt, then

such plaintiff could have taken all of such particular flour, to the exclusion of everyone else. It is only when intermingled goods are indistinguishable that the doctrine of ratable distribution becomes applicable. Therefore, the ground on which the trial court refused to recognize the claim of the Bank, namely, that the property claimed by it was indistinguishable from the mass, is at variance with the very principle of ratable distribution on which plaintiffs rely, and which the trial court applied in this case, so far as plaintiffs are concerned.

The court cites no authority for its conclusion that the tortious commingling of the flour by the Warehouse Company extinguished the Bank's pledge. As opposed to this conclusion, the following cases are closely in point:

In *Easton v. Hodges* (C. C. Wis.) 18 Fed. 677, one Valleau operated a warehouse in which a man named Baker had deposited wheat. Baker made a loan from the plaintiffs, who were bankers, and as security had Valleau segregate some of the wheat into particular bins and deliver a warehouse receipt against the segregated wheat directly to the plaintiffs as pledgees. The plaintiffs also made a loan to Valleau on similar receipts for his own wheat which he set aside in the same bins. The defendants were purchasers from Valleau, against whom the plaintiffs, as pledgees, brought an action for conversion of the pledged wheat. One of the defenses was that Valleau had commingled the pledged wheat with other wheat into an indistinguishable mass and that the pledge was thereby destroyed. The court instructed the jury that these facts were not a defense, saying (p. 682):

> "The evidence tends to show (perhaps it would be more accurate to say the evidence does show) that

> after the bins of wheat pledged to plaintiffs and their assignors were selected and set apart for them, Valleau, without the knowledge and consent of the plaintiffs or the bank, and for the purpose of improving the grade of the wheat in those bins, mixed other wheat of his own of a better quality with the wheat in those bins, in such a manner as to render it impracticable to distinguish or separate the wheat so subsequently put into the bins, and so mixed, from the wheat in the bins at the time they were so selected and set apart. *I cannot think that such a mingling of plaintiffs' wheat with that of Valleau subsequently purchased from the farmers, or taken from other wheat in the elevator, without the plaintiffs' knowledge, would affect the plaintiffs' title to the wheat in those bins, but that their interest would attach to an equal number of bushels of the wheat in those bins upon and from the time of such mixing''* (italics ours).

Eggers v. Hayes, 40 Minn. 182, 41 N. W. 970, involved the same question as this case. It holds that where there is a shortage of commingled wheat in the possession of an insolvent warehouse, the holder of a receipt, *as pledgee,* is entitled to participate ratably with the other depositors. In that case the holders of warehouse receipts, like the plaintiffs in the case at bar, brought suit to exclude the defendant from participating in the wheat on hand. The defendant held a receipt which the warehouseman had issued as security upon grain of his own in order to secure his own debt. At the time of the issuance of the receipt the warehouseman had sufficient grain of his own in the warehouse to cover the pledge, so that the pledge was valid, under the decision in *National Exchange Bank v. Wilder,* 34 Minn. 149, 24 N. W. 699. Similarly in the case at bar the pledge was valid because the Trading Company actually delivered the flour into the warehouse

pursuant to the pledge. The court in the *Eggers* case reversed a decree excluding the pledgee from ratable participation. After citing *National Exchange Bank v. Wilder,* supra, to the point that the pledge was valid in its inception, the court said (p. 971):

> "In that case, which controls this, it was held, modifying what had been stated (unnecessarily for its determination) in Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. Rep. 244, that the statute embraced and included as depositors all who owned or held grain actually in store, whether deposited by themselves or by others to whose rights they have succeeded, and that no distinction can be made between the person who makes an actual physical delivery of his grain at the warehouse and the pledgee of the grain of a warehouseman—actually on deposit in his warehouse —who leaves it in store with the proprietor, as his bailee, taking a warehouse receipt therefor, and that in either event the parties have grain on deposit with the warehouseman.
>
> In the case at bar there was at the time of the pledge much more grain actually in store, the property of Meader & Co., than was needed to meet and redeem the storage receipt issued to appellant. Had it then been presented the required amount would have been delivered. Had appellant then returned the wheat to the custody of the warehouseman, taking a ticket or receipt, we see no reason why we should not have an actual depositor of the precise kind respondents' counsel insist should alone be recognized in the distribution of the wheat in question or its proceeds. It cannot be successfully urged that the scant formality of weighing a quantity of wheat out of a warehouse and then weighing it back again is essential to the protection of these who, following a well established custom, loan money on this form of security. *All of the receipt holders mentioned in the pleadings are entitled to participate*" (italics ours).

See also:

Forbes v. Fitchburg R. Co., 133 Mass. 154, 156, 160 (Holding pledgees of bill of lading could recover for conversion of wheat, notwithstanding commingling thereof with other grain in railroad's elevator);

Arthur v. Chicago, Rock Island etc. R. Co., 61 Iowa 648, 17 N. W. 24, 25 ("The mere fact of an admixture of goods of the same grade and quality does not divest the owner of his property, whether the act be done with or without his knowledge");

Edelhoff v. Horner-Miller Straw-Goods Mfg. Co., 86 Md. 595, 39 Atl. 314 ("The lien of a chattel mortgage is not impaired by a commingling of the goods mortgaged with other goods without the knowledge or consent of the mortgagee" (Syllabus));

National Exchange Bank v. Wilder, 34 Minn. 149, 24 N. W. 699 (A pledgee is a "depositor" under Minnesota statute providing that "whenever any grain is delivered for storage" the transaction is a bailment, notwithstanding agreement that warehouseman may intermingle grain and sell it for his account, and "The * * * pledgee becomes tenant in common with the other owners" (p. 700)).

Besides the foregoing rule with respect to intermingled goods, the law of confusion of goods also, we think, affords a clear analogy to the case at bar. It is settled that the rule, whereby a party loses his goods if he wrongfully or fraudulently confuses or commingles them with the goods of another person, so that they cannot be distinguished (12 C. J. 491, 492), does not operate to cut off the rights of innocent third persons in the mass (*Smith v. Town of Au Gres* (6th C. C. A.) 150 Fed. 257, 261; *Erie*

R. Co. v. Dial (6th C. C. A.) 140 Fed. 689, 691; *Virginia-Carolina Chemical Co. v. Rogers,* 172 N. C. 154, 90 S. E. 129; *National Park Bank v. Goddard,* 9 Misc. 626, 30 N. Y. S. 417, 420; 12 C. J. 496). In the case at bar plaintiffs in effect contend that, because of the wrongful acts of the Warehouse Company, the property of The National City Bank should be taken from it and applied upon their claims.

Second: The maxim invoked by plaintiffs in the court below that between equal equities the legal title prevails is inapplicable.

In the trial court plaintiffs argued that they were collectively holders of the legal title to the confused mass of flour, and that The National City Bank was only holder of a special property as pledgee, and on that ground contended that their claims were prior to those of the Bank under the maxim that where equities are equal the legal title prevails. The trial court evidently regarded this contention as unsound, because it is not mentioned in the opinion. As showing that the maxim invoked by plaintiffs has no application, we submit:

1. The cases already cited allow a pledgee to participate ratably with other receipt-holders where there is a deficiency in a commingled mass of goods.

2. The distribution of such a mass is not to be solely determined by the whereabouts of the legal title. The ruling maxim in such cases is that "equality is equity." It was so held in *Goodman v. Northcutt,* 14 Ore. 529, 13 Pac. 485, where the court said (13 Pac. 488):

> "There was a shortage of wheat in the warehouse before any was taken out to put aboard of said cars. There was only about two-thirds enough to pay the

> depositors, including the appellant, the amounts they had respectively stored there; and, the wheat not having been kept separate, the deficiency or loss, from whatever circumstance it may have occurred, if not occasioned by the fault of any of them, must fall upon all in the proportion which the amount of wheat each had deposited bore to the whole amount deposited. *This rule is based upon a maxim that all courts are bound to observe,—the maxim that equality is equity; and it certainly could have no better foundation''* (italics ours).

In *Smith v. J. B. Moors & Co.*, 215 Pa. 421, 64 Atl. 593, a manufacturing company intermingled and pledged certain wool, to part of which one claimant had legal title and on the remainder of which another claimant had an equitable lien. Both claimants were subordinate to the pledgee, who had taken the pledge in good faith from the manufacturing company as ostensible owner. The one claimant, however, claimed that his legal title conferred priority over the equitable lien in the residue of the proceeds of the wool left after satisfying the claim of the pledgee. The court held that both claimants should participate ratably, quoting from 1 *Story's Eq. Jur.* (13th Ed.) Section 554, as follows:

> '' 'It is a general rule that equitable assets shall be distributed equally and pari passu among all the creditors without any reference to the priority or dignity of the debt; for the courts of equity regard all debts in conscience as equal jure naturali, and equally entitled to be paid; and here they follow their own favorite maxim that equality is equity. And if the fund falls short, all the creditors are required to abate in proportion.' ''

3. With respect to the pledged flour, there was outstanding in the Bank, as pledgee, and in the Trading

Company, as pledgor, a legal title to the pledged property held by the Warehouse Company, as complete and perfect as the title of any of the plaintiffs to property represented by their warehouse receipts. The Bank, as pledgee, represented this legal title to the extent necessary to protect the pledge. So, in *Means v. Bank of Randall,* 146 U. S. 620, the Supreme Court said (p. 627):

> "When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser, so far as the exercise of those rights was necessary to protect the holder."

See also:

Dale v. Pattison, 234 U. S. 399, 411;

Gibson v. Stevens, 8 How. 384, 400;

Groveland Banking Co. v. City National Bank, 144 Tenn. 520, 234 S. W. 643, 646;

First National Bank v. Lincoln Grain Co. (Neb.) 219 N. W. 192, 196;

Anderson v. Keystone Chemical Supply Co., 293 Ill. 468, 127 N. E. 668;

31 *Cyc.* 847-848.

4. A proceeding, like this proceeding, for the ratable distribution of a deficient quantity of warehoused goods is in equity, and all claimants must be made parties (*Dows v. Ekstrone* (C. C. Minn.) 3 Fed. 19; *Dole v. Olmstead,* 36 Ill. 150, 155; *Wieland v. Sunwall,* 63 Minn. 320, 65 N. W. 628; *Tobin v. Portland Flouring Mills Co.,* 41 Ore. 269, 68 Pac. 743; *Hamilton v. Blair,* 23 Ore. 64, 31 Pac. 197). The reason for making them parties is to permit them to set up their rights. We submit that plaintiffs, having disregarded this rule and failed to make either the Bank

or the Trading Company a party to the suit, are in no position to invoke the bare legal title outstanding in the Trading Company as an argument for depriving the Bank, as pledgee of the Trading Company, of its property.

This is independent of the non-joinder of the Bank and Trading Company as a ground, in and of itself, for reversal of the decree (see *National City Bank v. Harbin Electric Joint Stock Co.* (9th C. C. A.) 28 Fed. (2d) 468, and cases there cited).

Third: The difference in the form of the receipts held by plaintiffs from those issued to The National City Bank, as pledgee, does not justify exclusion of the Bank from ratable participation in the proceeds of the sale of the flour. The Warehouse Company was as much a bailee for the Bank, as pledgee, as it was for plaintiffs, as ordinary depositors.

There is, we submit, no difference between the relationship of the Warehouse Company to plaintiffs and its relation to the Bank, which justifies exclusion of the Bank from sharing proportionately in the proceeds of the sale of the flour. The Warehouse Company was as much a bailee for the Bank, as pledgee, as it was for plaintiffs, as ordinary depositors.

In *Union Trust Co. v. Wilson,* 198 U. S. 530, one Flanders, a merchant, leased part of his basement to a Warehouse Company, which assumed exclusive control of it. The Warehouse Company issued to Flanders a receipt for certain leather, which he endorsed to the defendant bank as security. In holding that the bank had a better title to the leather than the trustee in bankruptcy of Flanders, the court held that the issuance of the receipt as collateral security made the Warehouse Company bailee for the Bank as pledgee. The court said (p. 536):

> "No question under the statutes of Illinois is suggested. Apart from statute a warehouse receipt simply imports that the goods are in the hands of a certain kind of bailee. A bailee asserting a lien for charges has the technical possession of the goods. But it always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another to whom the owner has sold, mortgaged or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge."

To the same effect are:

Atherton v. Beaman (1st C. C. A.) 264 Fed. 878, 882;

Pierce v. National Bank of Commerce (8th C. C. A.) 268 Fed. 487, 493;

Cochran & Fulton v. Ripy etc. Co., 13 Bush (Ky.) 495, 506;

De Wolf v. Gardner, 12 Cush. (Mass.) 19, 25.

There being, as we contend, no substantial difference between the relationship of The Warehouse Company to plaintiffs and its relation to the Bank, it follows, we submit, that plaintiffs are not entitled to priority merely because their documents are called "godown warrants" and the Bank's documents are not called "godown warrants." The endorsements of the Warehouse Company on the Bank's documents, that it had received the pledged flour and would hold it subject to the Bank's order (Exh. 1, Tr. p. 19) are warehouse receipts just as much as the "godown warrants" of plaintiffs. It is well settled that a warehouse receipt need not be in any particular form (*Jones on Collateral Securities, Pledges* (3rd Ed.) p. 359). As pointed out by the Supreme Court in *Union Trust Co. v. Wilson,* 198 U. S. 530, supra, "Apart from statute a

warehouse receipt simply imports that the goods are in the hands of a certain kind of bailee."

The whole contention of plaintiffs, based on the difference in form between their warrants and the Bank's documents, is, we submit, a mere matter of names, affording no sound or just reason for differentiating between the parties. Equity regards substance rather than form (*Hurley v. Atchison etc. R. Co.*, 213 U. S. 126, 134; *Peugh v. Davis*, 96 U. S. 332, 336; 21 *C. J.* 204), and, as we have shown, applies in such cases as the present, the obviously fair and just principle that equality is equity.

CONCLUSION.

We submit that the decree below denying The National City Bank a ratable proportion of the amounts realized from the sale of the flour is inequitable and contrary to well settled principles of law, and that it should be reversed.

Dated, San Francisco,
May 18, 1929.

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